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No. 83-1273

In The

Supreme Court of the United States

October Term, 1983

LEWIS SERVICE CENTER, INC.,

Petitioner,

vs.

MACK TRUCKS, INC.,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER LEWIS SERVICE CENTER, INC.

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On March 20, 1984, this Court rendered its decision and opinion in *Monsanto Co. v. Spray-Rite Service Corp.*, — U.S. —, 52 U.S.L.W. 4341 (1984). The Court's opinion in *Monsanto* suggests that the decision of the Eighth Circuit Court of Appeals in this case was erroneous. Therefore, the case should be reversed and remanded to that court. Alternatively, this Court's opinion strongly indicates that the Court should grant certiorari in this case

to resolve substantial issues on the appropriate standard of antitrust analysis in resale price fixing cases.

This supplemental brief to Lewis' Petition for a Writ of Certiorari will briefly discuss the significance of the *Monsanto* decision to this case and respond to the Brief for the United States as Amicus Curiae.

DISCUSSION

A. The Monsanto Opinion suggests that this is an appropriate case to consider the appropriate antitrust standard in resale price maintenance cases.

Although the *Monsanto* case engendered a great deal of controversy and anticipation concerning the Court's position on the appropriate antitrust standard—per se or rule of reason—in resale price maintenance cases, the Court declined to reach that question. *Monsanto,* 52 U.S. L.W. at 4343, n. 7. This case, however, presents an appropriate vehicle for consideration of that issue. The applicability of rule of reason analysis was argued to the district court and the Court of Appeals. Before trial (Pet. App. 15) and after trial (Pet. App. 19) the fact finder rejected that standard. The Court of Appeals, after reweighing the evidence, reversed a jury finding of per se unlawful conduct, stating that it was not proper to apply a per se standard to vertical price restraints, "(u)nless they are shown to have a 'pernicious effect on competition' . . ." (Pet. App. 12) and held that the rule of reason

was the appropriate standard.[1] Obviously the circuit court did not have the lucid guidance provided by the Court in *Monsanto*, 52 U.S.L.W. at 4343:

> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 404-409 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977).

The Court should grant certiorari in this case to resolve this lingering and important issue of antitrust policy.

B. The Eighth Circuit Court of Appeals' decision in this case conflicts with the Supreme Court's opinion in Monsanto Co. v. Spray-Rite Service Corp.

The *Monsanto* case concerned the sufficiency of evidence necessary to a jury finding that a manufacturer engaged in illegal vertical price fixing. Although that case involved a dealer who was terminated by the manufacturer at the insistence of competing dealers, the *Monsanto* Court's holding is applicable whenever a manufacturer

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[1]The Government apparently believes that the rule of reason was properly applied in this case and that Lewis does not complain of the Court of Appeals' analysis (Brief, 11, n.14). Nothing could be further from the truth. This case was submitted to the jury solely on a per se theory; the Court of Appeals had a sparse record with which to perform any competent rule of reason analysis. Moreover, a remand to the district court for the development of a full record and a competent reasonableness analysis would be more appropriate. *See e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

seeks to impose a resale price maintenance scheme by coercing dealers' adherence.

The Court in *Monsanto* held that to prove an agreement to fix resale prices, an "antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'." *Monsanto*, 52 U.S.L.W. at 4344, *quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). The *Monsanto* Court affirmed a jury finding that the manufacturer had conspired with others to maintain resale prices and discipline price cutters by termination. *Id.*

In this case the jury had ample evidence to conclude, as it did, that Mack Trucks, Inc. and its subsidiary, Mack Financial Corp., had "'a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement'" *Monsanto*, 52 U.S.L.W. at 4344, *quoting American Tobacco Co. v. United States*, 328 U.S. 791, 810 (1946), to coerce Mack dealers to maintain Mack dictated prices. Similarly, the *Monsanto* Court found that "(t)here was evidence that the parent instructed its subsidiary to comply (with the price fixing arrangement), and the distributor informed Monsanto that it would charge the suggested price. . . . Evidence of this kind plainly is relevant and persuasive as to a meeting of the minds."[2]

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[2]In an accompanying footnote the Court continued: "In addition, there was circumstantial evidence that Monsanto sought

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The resale price maintenance arrangement instituted and maintained by Mack was more pernicious than Monsanto's, and the jury necessarily found that the sales assistance program constituted price fixing. Mack held a coercive lever over its dealers by withholding proceeds on the sale until dealers produced proof that the sale was at the price established by Mack. If a noncomplying dealer made a sale at a price greater than Mack's price, Mack kept all the withheld funds. On the uncontroverted evidence adduced at trial, it is naive to assume, as the Court of Appeals below and the Government have, that Mack's interest in the sales assistance program was merely to ensure that wholesale price reductions were passed down to customers and to control dealer avarice. Rather, the evidence clearly demonstrated Mack's interest was locking in retail prices and controlling retail prices at the manufacturer established level.

It is also highly relevant that the district court below, in ruling on Mack's motion for judgment nov, and after hearing all testimony, found that the jury was justified in concluding that Mack's sales assistance program, as implemented, was a coercive device to ensure dealer adherence to Mack's resale price maintenance plan. (Pet. App. 17). The Court of Appeals erred in disregarding the jury's conclusion on the issue of proof of a vertical price

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agreement from the distributor to conform to the resale price. The threat to cut off the distributor's supply came during Monsanto's 'shipping season' when herbicide was in short supply. The jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance." 52 U.S.L.W. at 4344, n.10.

fixing arrangement and in holding that the rule of reason is the appropriate standard for considering these types of price restraints.

The Court should reverse the decision of the Court of Appeals and remand the case with instructions to reinstate the jury verdict.

C. The Government misperceives the nature of the restraint in this case and the effect of a denial of certiorari.

In its amicus curiae brief, the Government champions the Court of Appeals' decision, and states that the decision does not conflict with any other appellate decisions. (Brief, 7). The Government disregards the issue that the standard of antitrust liability is not clearly presented and, by describing the lower court opinion as "factbound", apparently assumes this Court will not be interested in reviewing that opinion. (Brief, 8, 11).

The Petitioner assumes that the Government is interested in matters of antitrust policy, generally, and in particular, the application of the per se rule to resale price maintenance arrangements. However, the Petitioner also believes that Mack's sales assistance program exerts a pernicious effect on competition in the retail market for trucks and that judicial approval of such a program invites widespread adoption of an anticompetitive arrangement. Clearly, antitrust policy is not advanced under those circumstances.

Moreover, the Petitioner does not believe that a case lacks worth for certiorari purposes because of a "factbound" lower court decision. Issues of conduct character-

ization in antitrust litigation are quite factual, and this Court has never seemed reluctant to disapprove erroneous factual characterization. *See, e.g., Jefferson Parish Hospital v. Hyde*, — U.S. —, 52 U.S.L.W. 4385 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). In *Lewis*, the Court of Appeals seriously mischaracterized the conduct, and evidence of the conduct, in arriving at its erroneous conclusion. The Government has apparently made the same error by assuming that the sales assistance program controls dealer profits and not retail prices and that Mack's objectives for the program are all beneficial and procompetitive.

Petitioner urges the Court to review carefully the lower court's inartful and inaccurate characterization of the sales assistance program in deciding whether or not to grant certiorari. Like the Government, Petitioner has a strong interest in sound antitrust enforcement, whether private or public; however, unlike the Government, Petitioner has a substantial economic interest in this particular case and knows the evidence presented at trial to the jury and the erroneous nature of the Court of Appeals' decision.

CONCLUSION

The Petitioner requests that the Court reverse the decision of the Court of Appeals in this case and remand it for disposition consistent with the *Monsanto* decision.

Alternatively, the Petitioner requests this Court to grant the Writ of Certiorari to consider important issues of antitrust law and policy.

Respectfully submitted,

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